Supreme Court No. 84856-4
Court of Appeals No. 38104-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Olsen

Appellant/Petitioner

Thurston County Superior Court

Cause No. 07-1-01363-0

The Honorable Judge Christine A. Pomeroy

PETITIONER'S SUPPLEMENTAL BRIEF

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1. Is an accused person legally accountable for another person's crimes, when those crimes were completed before the accused became an accomplice of such other person?

2. Did the trial court violate Mr. Olsen's public trial right (under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 10 and 22) by hearing argument and ruling on a jury question in the privacy of the judge's chambers?

3. Did the trial judge violate Mr. Olsen's Fourteenth Amendment right to due process and his state constitutional right to a jury trial by denying a request for instructions on the lesser included offense of Manslaughter in the Second Degree?

STATEMENT OF FACTS

After police discovered Jerry Totten's body in an abandoned truck, Michael Sublett and April Frazier were arrested in Las Vegas. RP (6/3/08) 60-61, 63; RP (6/4/08) 119, 241; RP (6/5/09) 409. They were in possession of Mr. Totten's wallet and other property, and investigation revealed that the two had been stealing from Mr. Totten for months. RP (6/3/08) 85-57, 89-100, 102-106; RP (6/9/08) 439-442, 450-461, 479-487, 509, 513; RP (6/10/08) 616; RP (6/12/08 pm) 33-35, 47-48. Frazier claimed that she'd had no involvement in the death; instead, she alleged that Sublett and a younger man named Christopher Olsen had planned to rob Mr. Totten, and that Mr. Olsen had caused Mr. Totten's death during the robbery. RP (6/9/08) 522, 530-531, 543, 583; RP (6/10/08) 662. The only physical evidence tying Mr. Olsen to Mr. Totten's house was a trace

amount of DNA found in a rubber glove in the utility room. RP (6/4/08) 211, 213; RP (6/5/08) 337-338.

Mr. Olsen was charged with first-degree murder. CP 3. He denied involvement in the killing.[1] Exhibits 179a and b. Instead, he described being recruited by Frazier and Sublett to help steal from Mr. Totten. He insisted that he had not agreed to hurt anyone or commit a robbery. RP (6/11/08) 809, 836-837; RP (6/16/08) 854-857, 872, 875, 878.

When Frazier and Sublett brought Mr. Olsen to Mr. Totten's house, he noticed a terrible smell. Mr. Totten lay on a recliner, covered by a blanket; he wasn't moving or talking. RP (6/11/08) 798; RP (8/16/08) 855. Mr. Olsen believed that Mr. Totten had already been either killed or fatally wounded. RP (6/11/08) 792-810; RP (6/16/08) 853, 855; Ex. 179a, p. 41, 42, 50, 58-60. Sublett told him that Mr. Totten was "taken care of," tied up on the recliner under a blanket, and not going "nowhere." Ex. 179a, p. 10- 12. Olsen overheard Frazier talking to Sublett about hitting Mr. Totten with a bat, knocking him out. Ex. 179a, p. 25, 49, 58. As Mr. Olsen described it during an interview: he was either "alive and just really quiet you know, or Mike had already killed him..." Ex. 179a, p. 45. According to police, Mr. Olsen

[1] Mr. Olsen's trial testimony was generally consistent with his statements to the police. RP (6/16/08) 852-927; Ex. 179a and b.

> made mention a couple of times about, you know, [Mr. Totten] still being alive when he got there, questioning whether or not, you know, he could have done anything. He kind of made references like that on a couple of different occasions.
> RP (6/11/08) 798-800.

During trial, when asked if he knew whether Mr. Totten was alive or dead, Mr. Olsen said, "No, sir, without checking his pulse I could not have known that, no." RP (8/16/08) 855.[2]

Mr. Olsen became quite emotional and crouched under a table and cried when he realized Mr. Totten had been assaulted or killed. RP (6/10/08) 628. In response, Sublett pointed a gun at Mr. Olsen and told him, "You work for me," and threatened him and his family.[3] RP (6/11/08) 809, 836-837; RP (6/16/08) 854-857; Ex. 179a, p. 7. Frazier confirmed that Sublett pointed his gun at Mr. Olsen twice: once in Mr. Totten's house, and later in a hotel room. RP (6/10/08) 629, 642. Mr. Olsen acknowledged that he helped steal items from the house, and helped move Mr. Totten's body.[4] RP (6/11/08) 801-804; RP (6/16/08) 853. It was

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[2] In his statement to police, he said that Frazier and Sublett had left him in the hotel room for 3 to 4 hours, came back "pissed" and "pissy," and argued with each other. Then they ordered him to come to Mr. Totten's house with them. Ex. 179a, p. 6-11. It was at this time that he thought they must have killed Mr. Totten. Ex. 179a, p. 45.

[3] Mr. Olsen's mother later confirmed that Frazier had threatened her as well as Mr. Olsen. RP (6/12/08 pm) 20-22.

[4] Mr. Olsen did not keep any items from Mr. Totten's home for himself. RP (6/10/08) 644-646; RP (6/16/08) 857.

while moving the body that he put on the rubber gloves later found to contain his DNA. RP (6/16/08) 853, 916-917, 938, 940.

At trial, Mr. Olsen proposed instructions on Manslaughter in the Second Degree. CP 29-45. The trial court refused the instructions.[5] RP (6/17/08) 956-957; CP 46-77. The trial court's "to convict" instruction outlined the elements of felony murder. The instruction required conviction if the jury found (*inter alia*):

> (2) That the defendant or an accomplice was committing or attempting to commit the crime of burglary in the first degree or robbery in the first or second degree; [and]
> (3) That the defendant, or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime or in immediate flight from such crime...
> Instruction No. 15, CP 64.

The court also outlined the requirements of accomplice liability:

> ...A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
> ...A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.
> Instruction No. 21, CP 71.

[5] The record does not reveal the basis for the court's decision; however, defense counsel's exception to the court's refusal suggests that the trial judge did not believe a sufficient factual basis supported the instructions. RP (6/17/08) 956-957.

The instructions did not explain that a burglary terminates when the participants leave the scene, and that a second burglary begins if they later return to commit additional crimes. Court's Instructions, CP 46-77. Nor did the instructions explain that Mr. Olsen could be convicted of felony murder only if he became an accomplice before Mr. Totten was killed or fatally wounded. CP 46-77. Nor did the instructions explain that Mr. Olsen must be acquitted of felony murder if he became an accomplice after Mr. Totten was killed or fatally wounded. CP 46-77.

During deliberations, the jury submitted a question about accomplice liability:

> Clarification of Instruction 21. The structuring of the 2nd sentence in the 1st paragraph is unclear. Which of the following is correct for intent? A person (x) is legally accountable for the conduct of another person (y) when he or she (x) is an accomplice of such other person (y) in the commission of the crime. – or – A person (x) is legally accountable for the conduct of another person (y) when he or she (y) is an accomplice of such other person (x) in the commission of the crime.
> CP (Sublett) 129.[6]

The judge met with counsel in chambers and formulated a written response. CP (Sublett) 71, 129. No reference to the question was made in open court. RP (6/17/08) 1077 – RP (6/18/08) 1100. A copy of the question and the response were filed in the court file. CP (Sublett) 129.

The jury acquitted Mr. Olsen of premeditated first-degree murder, and found him guilty of first-degree felony murder. CP 3-12, 78.

ARGUMENT

I. A COURT'S INSTRUCTIONS MUST MAKE MANIFESTLY CLEAR THAT ACCOMPLICE LIABILITY DOES NOT ATTACH FOR CRIMES COMPLETED BEFORE A PERSON JOINS AN ONGOING CRIME SPREE.

Standard of Review: Constitutional violations and jury instructions are reviewed *de novo*. *State v. Schaler,* 169 Wash.2d 274, 282, 236 P.3d 858 (2010); *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010).

A. Jury instructions violate an accused person's Fourteenth Amendment right to due process if they relieve the prosecution of its burden to prove every element of a criminal offense.

Due process requires the state to prove every element of a criminal offense. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions that relieve the state of this burden are unconstitutional. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wash.2d 67, 76, 941 P.2d 661 (1997). Because juries lack tools of statutory construction,[7] jury instructions must more than adequately convey the law; instead, they must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

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[6] This citation is to the clerk's papers in codefendant Sublett's case, which was consolidated with Mr. Olsen's case on appeal. The Court of Appeals granted Mr. Olsen's motion to file a supplemental brief, incorporating Mr. Sublett's argument on this issue.

[7] *See, e.g., State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

B. A person is not guilty of another's crime if that crime was completed before the two became accomplices.

A person may be convicted as an accomplice if she or he, acting "[w]ith knowledge that it will promote or facilitate the commission of *the crime*... aids or agrees to aid [another] person in planning or committing it." RCW 9A.08.020 (emphasis added). The use of the phrase "the crime" indicates intent to punish involvement only in those crimes of which a participant has knowledge. *See, e.g., State v. Roberts,* 142 Wash.2d 471, 14 P.3d 713 (2000); *State v. Cronin,* 142 Wash.2d 568, 14 P.3d 752 (2000).

A person is guilty of first-degree felony murder when she or he "commits or attempts to commit *the crime* of either (1) robbery in the first or second degree... [or] (3) burglary in the first degree... and in the course of or in furtherance of *such crime* or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants..." RCW 9A.32.030(c) (emphasis added). As with the accomplice liability statute, the phrases "the crime" and "such crime" (rather than "a" or "any" crime) must indicate the legislature's intent to punish those who are involved in the specific underlying crime causally connected to the death. *Roberts, supra; Cronin, supra.*

In other words, a killing that occurs in the course of one crime does not make co-participants in any subsequent crime guilty of felony murder,

unless they were also accomplices to the first crime. RCW 9A.32.030(c). For example, a person who does not aid or agree to aid another in planning or committing a robbery cannot be found guilty of felony murder occurring during the robbery. This is true even if s/he helps dispose of stolen property following the robbery.

C. The court's instructions were not manifestly clear and allowed conviction even if Mr. Olsen became an accomplice only after Mr. Totten was killed or fatally wounded.

The defense theory at trial was that Sublett and Frazier killed (or fatally wounded) Mr. Totten before they recruited Mr. Olsen. The defense theory rested on evidence that (1) Sublett and Frazier committed more than one burglary of Mr. Totten's residence, and (2) that they completed the burglary/robbery resulting in Mr. Totten's death before Mr. Olsen even went to the residence. Under this version of the facts, the jury should have acquitted Mr. Olsen of felony murder.

Most of the evidence supporting this multiple burglary theory derived from Mr. Olsen's testimony and his statements to the police. Specifically, Mr. Olsen denied participating in—or witnessing—any assault on Mr. Totten. Ex. 179a, 179b; RP (6/11/08) 791-810. He told the police (and later the jury) that he noticed a bad smell, like gas, when he first arrived at the house. RP (6/11/08) 836-837; RP (6/16/08) 853. Frazier confirmed that Mr. Totten's body had a bad smell. RP (6/16/08) 938. This

suggested that Mr. Totten had been dead for some time when Mr. Olsen first joined Sublett and Frazier at the house.

At some point after joining Sublett and Frazier at the house, Mr. Olsen learned (apparently from Sublett)[8] that Mr. Totten "was tied up in a recliner in the living room with a blanket over him." RP (6/11/08) 799. Mr. Olsen saw the recliner, and came to realize there was a body on it. RP (6/11/08) 799; RP (6/16/08) 915. He never saw Mr. Totten move or talk. RP (6/16/08) 855. He later helped move the body. RP (6/11/08) 801-804.

If jurors believed this version of events, they should have acquitted Mr. Olsen of felony murder. Acquittal was required whether Mr. Olsen arrived before or after the actual moment of Mr. Totten's death. RCW 9A.32.030(c). According to his testimony, he was not involved in the burglary/robbery that resulted in Mr. Totten's death. Instead, he only participated in a later burglary, after Mr. Totten had been killed or fatally wounded. Legally speaking, he did not participate in "the crime" specified in the felony murder statute. RCW 9A.32.030(c). As outlined above, accomplice liability attaches only to crimes committed *after* a person joins an ongoing crime spree. RCW 9A.32.030(c).

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[8] The witnesses were careful to "sanitize" Mr. Olsen's out-of-court statements, removing any reference to Sublett. Instead, they referred to "the other individual." *See, e.g.,* RP (6/11/08) 794, 798, 799.

Mr. Olsen's testimony and statements to the police—if believed by jurors—provided a basis for the conclusion that he joined Frazier and Sublett only after they'd killed or fatally wounded Mr. Totten.[9] This version of the facts should lead to Mr. Olsen's acquittal. RCW 9A.32.030(c).

The court's instructions, however, did not require this result. Instead, the instructions permitted conviction even if Sublett and Frazier killed or fatally wounded Mr. Totten before they recruited Mr. Olsen. CP 59, 64, 71. This can be seen by analyzing the facts under three of the court's instructions.

First, the instructions made clear that Sublett committed a first-degree burglary. CP 66. Under any version of the facts, Sublett unlawfully entered Mr. Totten's residence with intent to commit a crime, and Mr. Totten was assaulted. Mr. Olsen also participated in a first-degree burglary: according to his testimony and statements to the police, he unlawfully entered Mr. Totten's residence with intent to steal property. RP (6/11/08) 796-797; RP (6/12/08) 873-881. He was accompanied by

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[9] The Court of Appeals evidently did not believe Mr. Olsen's version of events. *State v. Sublett*, 156 Wash.App. 160, 190-191, 231 P.3d 231 (2010). However, such determinations are not for the reviewing court to make: "Credibility determinations are for the trier of fact and are not subject to review... This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas, at* 875.

Sublett, who was armed with a firearm. RP (6/11/08) 809, 836-837. This elevated the crime to first-degree burglary.[10] CP 66. However, Mr. Olsen's testimony and statements provided a basis to conclude that he participated in a burglary that was committed after Sublett had already assaulted Mr. Totten during an earlier illegal entry.

Second, the court's "to convict" instruction required a guilty verdict upon proof

> (2) That [Mr. Olsen] or an accomplice was committing or attempting to commit the crime of burglary in the first degree...; [and]
> (3) That [Mr. Olsen], or another participant, caused the death of Jerry Totten in the course of or in furtherance of such crime... Instruction No. 15 (Alternative B), CP 64.

Third, Instruction No. 21 defined the term "accomplice." Under the definition provided, Mr. Olsen and Sublett were accomplices to a first-degree burglary. CP 71. Mr. Olsen's testimony and statements to the police suggested that this joint effort was Mr. Olsen's first visit to the house. His testimony and statements—if believed by the jury—established that Sublett had unlawfully entered and killed Mr. Totten on an earlier occasion. RP (6/16/08) 852-919; Ex. 179a, 179b.

[10] Respondent erroneously argues that "[t]here was no evidence that in any burglary... that a deadly weapon was present..." Supplemental Brief of Respondent, p. 4.

Under the law, Mr. Olsen was an accomplice to the second burglary, but not to the first. However, none of the court's instructions explained to the jury that a burglary terminates when the participants leave the scene. CP 46-77; *see State v. Dennison,* 115 Wash.2d 609, 616, 801 P.2d 193 (1990). This allowed the jury to decide that Mr. Olsen was an accomplice to a single, ongoing crime. The crime commenced when Sublett first went to the house and killed Mr. Totten (without Mr. Olsen's involvement). It continued when Sublett and Frazier recruited Mr. Olsen and brought him to the house to pack up property and move the body. It terminated only when all three left the house for the last time and disposed of the body. If jurors erroneously believed that the law made Mr. Olsen an accomplice to a single ongoing burglary, they would have convicted him of felony murder even under his version of the facts.

Under the unique facts of this case, the court's instructions did not make the relevant legal standard manifestly apparent to the average juror. *Kyllo, at* 864. Mr. Olsen's testimony and statements to the police suggested that he was not an accomplice to Sublett's first burglary, but that he was an accomplice to a second burglary. Given this evidence, the court's instructions should have made clear that a burglary terminates when the participants leave the scene. The instructions should also have

made clear that accomplice liability does not attach to crimes committed before the accused person joins a crime spree.

The jury should have been instructed on these points because the facts (combined with the instructions actually given) created an ambiguity. This ambiguity allowed the jury to convict even absent proof of the essential elements of felony murder. The lack of instruction on these critical points relieved the state of its burden to prove that Mr. Olsen was an accomplice to the specific first-degree burglary that resulted in Mr. Totten's death. Instead, conviction was permitted even if he did not participate in Sublett's first burglary but did participate in a later burglary.

This violated Mr. Olsen's Fourteenth Amendment right to due process. *Winship, supra; Thomas, supra.* Accordingly, Mr. Olsen's felony murder conviction must be reversed and the case remanded for a new trial. *Id.* Upon retrial, the court must clarify the jury's obligation to acquit Mr. Olsen of crimes committed by Sublett and Frazier before he joined them as an accomplice. RCW 9A.32.030(c); *Kyllo, supra.*

II. THE TRIAL COURT VIOLATED BOTH MR. OLSEN'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING AN *IN CAMERA* HEARING ON A JURY QUESTION.

Standard of Review: Alleged constitutional violations are reviewed *de novo. State v. Schaler, at* 282. Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo. In re Detention of D.F.F.*, 144 Wash.App. 214, 218, 183 P.3d 302 (2008) *review granted*, 164 Wash.2d 1034, 197 P.3d 1185 (2008).

A. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club,* 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 723, ___ L.Ed.2d ___ (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club, at* 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club, at* 261-262, 257.[11] In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct. *at* 724-725.

The public trial right ensures that an accused person "is fairly dealt with and not unjustly condemned." *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, "the presence of interested spectators may keep [the accused person's] triers keenly alive to a sense of the responsibility and to the importance of their functions." *Id.* The public trial right serves institutional functions: encouraging witnesses to come

forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode,* 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right "applies to all judicial proceedings." *Momah, at* 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely "ministerial." *See, e.g., Strode, at* 230.[12]

B. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearing to determine how best to respond to a jury question.[13] This *in camera* proceeding, conducted outside the public's eye without the required analysis and findings, violated Mr. Olsen's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash.

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[11] *See also State v. Strode,* 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman,* 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

[12] ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

[13] In its Supplemental Brief, Respondent questions for the first time whether the hearing was closed. Supplemental Brief of Respondent, p. 11. Presumably, had the hearing been open to the public, it would have been conducted in the courtroom with a clerk and/or a court reporter present. However, no transcript or clerk's minutes were generated from the proceeding.

Const. Article I, Sections 10 and 22; *Bone-Club, supra.* It also violated public's right to an open trial. *Id.* Accordingly, Mr. Olsen's conviction should have been reversed and the case remanded for a new trial. *Id.*

Instead of properly analyzing the closure and reversing the conviction, the Court of Appeals found *Bone-Club* analysis unnecessary. According to the Court of Appeals, the right to a public trial only extends to hearings that require the resolution of disputed facts.[14] *Sublett, at* 181-182.[15] But the evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was

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[14] The Court of Appeals also characterized questions from the jury as "part of jury deliberations" (which are conducted in private). *Sublett, at* 182. Although the Court cites a string of cases establishing that jury deliberations should not be open to the public, it cites no authority for its characterization of jury questions as "part of "deliberations. The closure here concerned a court proceeding, during which the *judge* heard from both attorneys and made a decision. CP (Sublett) 129. The cases cited by the Court of Appeals all relate to the secrecy of jury deliberations, and have no bearing on this case. *Sublett, at* 182.

[15] The Court cites *State v. Sadler,* 147 Wash.App. 97, 114, 193 P.3d 1108 (2008) ("[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts."); *see also State v. Koss,* ___ Wash.App.

(Continued on next page)

suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to feelings of resentment, and speculation about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or minority jurors.[16] Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When

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___, 241 P.3d 415, 418-419 (2010) (citing *Sublett, supra*); *In re Detention of Ticeson,* ___ Wash. App. ___, ___ P.3d ___ (2011).

[16] Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots; the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

The Court of Appeals also implied that the need for an open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett, at* 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of a written answer to the jury's question does not eliminate the constitutional requirement that proceedings be open and public.

In this case, the *in camera* hearing violated Mr. Olsen's public trial right under the state and federal constitutions. It also violated the public's right to monitor proceedings, in a case that was of significant public interest. For these reasons, Mr. Olsen's conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra.*

III. THE TRIAL COURT'S REFUSAL TO INSTRUCT ON MANSLAUGHTER IN THE SECOND DEGREE VIOLATED MR. OLSEN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS STATE CONSTITUTIONAL RIGHT TO HAVE THE JURY CONSIDER APPLICABLE LESSER INCLUDED OFFENSES.

Standard of Review: Constitutional violations are reviewed *de novo. Schaler, at* 282. A court's refusal to provide a requested jury instruction is reviewed *de novo* if the refusal is based on an issue of law. *State v. Brightman*, 155 Wash.2d 506, 519, 122 P.3d 150 (2005). If the refusal is based on a factual dispute, the evidence is taken in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina,* 141 Wash.2d 448, 455-456, 6 P.3d 1150 (2000).

A. Mr. Olsen was entitled to instructions on the lesser included offense of Manslaughter in the Second Degree

An accused person is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed. RCW 10.61.006; *State v. Nguyen*, 165 Wash.2d 428, 434, 197 P.3d 673 (2008) (citing *State v. Workman,* 90 Wash.2d 443, 584 P.2d 382 (1978)). The evidence is to be taken in a light most favorable to the defendant's position. *Fernandez-Medina, at* 455-456. Instructions on a lesser included offense "should be administered '[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Id, at* 456 (quoting *State v. Warden*, 133 Wash.2d 559, 563, 947 P.2d 708 (1997)).

A person commits Manslaughter in the Second Degree "when, with criminal negligence, he causes the death of another person." RCW 9A.32.070. Under the legal prong of the *Workman* test, manslaughter is a lesser included offense to a charge of premeditated murder. *State v.*

Schaffer, 135 Wash.2d 355, 357-358, 957 P.2d 214 (1998). A manslaughter charge can be based on the defendant's failure to summon aid, where the defendant has a legal duty to do so. *See State v. Morgan*, 86 Wash. App. 74, 81, 936 P.2d 20 (1997). RCW 9.69.100 imposes such a duty on anyone who witnesses a violent offense.

In this case, Mr. Olsen was entitled to instructions on the lesser included offense of Manslaughter in the Second Degree. The evidence (when taken in a light most favorable to Mr. Olsen's position) established that he was guilty only of the second-degree manslaughter. There are six pieces of evidence that support this.

First, Mr. Olsen's testimony and his statements to the police, if believed by the jury, suggested that he'd agreed to help Sublett and Frazier steal property, but that he had not agreed to participate in a robbery, a burglary, or a killing. In addition, he testified that he did not participate in or witness an assault on Mr. Totten. RP (6/16/08) 852-919; Ex. 179a, 179b. Taking this evidence in a light most favorable to Mr. Olsen's position, a rational jury could have found that he was not guilty of intentional murder. This conclusion is bolstered by the jury's verdict: Mr. Olsen was acquitted of intentional murder. CP 78.

Second, Mr. Olsen told police that he learned Mr. Totten had been "tied up in a recliner in the living room with a blanket over him." RP

(6/11/08) 799. He saw the recliner, and at some point realized Mr. Totten was on it. RP (6/11/08) 799; RP (6/16/08) 915. When interviewed by the police, he "made mention a couple of times about, you know, [Mr. Totten] still being alive when he got there." RP (6/11/08) 798-800. Although Mr. Totten wasn't moving or speaking, Mr. Olsen testified that he "could not have known" whether Mr. Totten was alive or dead "without checking his pulse..." RP (8/16/08) 855. Taking this evidence in a light most favorable to Mr. Olsen's position, his testimony and statements to police suggest that Mr. Totten was still alive[17] when Mr. Olsen arrived at the house, and that Mr. Olsen was a witness to a kidnapping (which qualifies as a violent offense). *See* RCW 9A.40.020; RCW 9A.40.030; *and* RCW 9.94A.030.

Third, because he was a witness to a violent offense, Mr. Olsen had a statutory duty to summon aid for Mr. Totten. RCW 9.69.100. Indeed, during his police interview Mr. Olsen was

> questioning whether or not, you know, he could have done anything [to help Mr. Totten]. He kind of made references like that on a couple of different occasions.
> RP (6/11/08) 798-800.

[17]Although Mr. Olsen testified that there was a strong odor when he arrived at the house, he also said that the odor was "like somebody had really super bad gas," and not like the smell of "rotting flesh." RP (6/11/08) 837.

Despite this, he did not summon aid. This breach of his duty to summon aid was sufficient evidence (as a matter of law) to establish recklessness or criminal negligence under *Morgan, supra.*

Fourth, Mr. Olsen's failure to summon aid was a cause of Mr. Totten's death, in that he might have lived if Mr. Olsen had acted. *See Morgan, supra; see also State v. Norman,* 61 Wash.App. 16, 808 P.2d 1159 (1991). Respondent suggests that this element is not met because Mr. Totten was killed by strangulation, would have died almost immediately, and thus would have been long dead when Mr. Olsen arrived at the house. Supplemental Brief of Respondent, p. 5, citing RP (6/5/08) 373-379.

There are two problems with this argument. First, it privileges the pathologist's analysis over Mr. Olsen's eyewitness account. The jury was entitled to disregard the pathologist's conclusions, and instead believe that Mr. Totten was alive when Mr. Olsen arrived.[18] *Thomas, at* 875. Second, it presumes the pathologist's conclusions wholly undermine Mr. Olsen's version of events. This is not necessarily true: it is possible that Mr. Olsen arrived at the house with knowledge that he was aiding in the commission

[18] Of course, the jury was also entitled to believe the pathologist and disregard Mr. Olsen's testimony, or to harmonize the two by concluding that Mr. Olsen reasonably but mistakenly believed Mr. Totten was still alive. The reviewing court, by contrast, is not permitted to weigh the testimony when considering the propriety of a lesser included instruction; instead, the court must interpret the evidence most strongly in favor of giving the requested instruction. *Fernandez-Medina, at* 455-456.

of a residential burglary, but that Sublett slipped inside and strangled Totten upon discovering that he was still alive. Under these circumstances, attempts to revive Mr. Totten might have been successful.

A rational jury could have accepted Mr. Olsen's version of events and concluded that his breach of his statutory duty to summon aid was a cause of Mr. Totten's death. *See Morgan, supra; Norman, supra.* Because of this, Mr. Olsen was entitled to instructions on the lesser included offense of Manslaughter in the Second Degree. *Fernandez-Medina, supra.*

B. The trial judge's refusal to instruct on second-degree manslaughter denied Mr. Olsen his Fourteenth Amendment right to due process and his state constitutional right to a jury trial.

Refusal to instruct on a lesser included offense can violate the right to due process under the Fourteenth Amendment.[19] U.S. Const. Amend. XIV; *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (1988).[20] [21] The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that

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[19] Respondent concedes a federal constitutional right to instruction on a lesser included offense. Supplemental Brief of Respondent, pp. 4-5.

[20] *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...")

[21] The Court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck, at* 638, n.14. Some federal courts only review a state court's failure to give a lesser included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990)

which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic, at* 1027. The trial judge's refusal to instruct on manslaughter violated Mr. Olsen's Fourteenth Amendment right to due process. *Id.*

Furthermore, the right to a jury trial under the Washington constitution is broader than the corresponding federal right. *State v. Hobble*, 126 Wash.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982). Mr. Olsen provided analysis under the six nonexclusive *Gunwall* factors in his Petition and in his briefing to the Court of Appeals. *State v. Gunwall*, 106 Wash.2d 54, 58, 720 P.2d 808 (1986). That analysis is adopted and incorporated herein. Analysis of Wash. Const. Article I, Sections 21 and 22 reveals a state constitutional right to have the jury instructed on applicable lesser included offenses.[22] The court's refusal to instruct on manslaughter violated Mr. Olsen's jury trial right. Wash. Const. Article I, Sections 21 and 22.

Because the trial judge refused to instruct the jury on the lesser included offense of Manslaughter in the Second Degree, Mr. Olsen was denied his constitutional right to a fair trial under the due process clause.

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[22] Respondent concedes a state constitutional right to instruction on a lesser included offense. Supplemental Brief of Respondent, pp. 4-5.

U.S. Const. Amend. XIV; *Vujosevic.* The refusal to instruct on manslaughter also violated Mr. Olsen's right to have the jury consider applicable included offenses under Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Olsen's conviction must be reversed and the case remanded for a new trial.[23] *Schaffer, supra.*

C. The Supreme Court should not overrule *Schaffer*.

In its Supplemental Brief, Respondent argues for the first time that the Supreme Court should revisit *Schaffer*. Supplemental Brief of Respondent, p. 7. The state contends that a person in Mr. Olsen's position suffers no harm from the erroneous failure to instruct on a lesser included offense when that person is acquitted of the greater offense. Supplemental Brief of Respondent, pp. 7-8. Respondent is incorrect.

Had the jury been given the opportunity to consider a manslaughter charge at Mr. Olsen's first trial, they may have elected to acquit him of felony murder and convict him only of manslaughter. As noted above, refusal to instruct on a lesser offense increases the risk of conviction "simply because the jury wishes to avoid setting [the accused person] free." *Vujosevic, at* 1027.

[23] On retrial, Mr. Olsen is entitled to an instruction on manslaughter, even though the jury found him not guilty of intentional murder. *Schaffer, at* 358-359.

Furthermore, the difference in penalty between the two crimes is significant. Second-degree manslaughter is a Class B felony, with a standard range of 108-120 months. By contrast, first-degree murder is a Class A felony, with a standard range of 411-548 months. The lost opportunity occasioned by the court's refusal to instruct on manslaughter can hardly be described as harmless.

Respondent suggests that a violation of Mr. Olsen's constitutional and statutory rights—the refusal to instruct on manslaughter at his first trial—should have no remedy. This would be inequitable. Accordingly, the Supreme Court should refuse Respondent's invitation to revisit *Schaffer*. Upon retrial, the court should instruct the jury on the lesser offense of second-degree manslaughter. *Schaffer, at* 358-359.

IV. MR. OLSEN ADOPTS AND INCORPORATES APPLICABLE ARGUMENTS FROM MR. SUBLETT'S SUPPLEMENTAL BRIEF.

Pursuant to RAP 10.1(g), Mr. Olsen adopts and incorporates all applicable arguments from Mr. Sublett's supplemental brief.

V. FOR THE REMAINING ISSUES RAISED IN THE PETITION, MR. OLSEN RELIES ON THE BRIEFS FILED IN THE COURT OF APPEALS, THE PETITIONS FOR REVIEW, AND MR. SUBLETT'S BRIEFING.

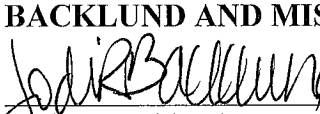
Rather than repeating the arguments made to the lower court, outlined in the Petitions for Review, and/or set forth in Mr. Sublett's briefing to this court and the Court of Appeals, Mr. Olsen adopts and/or relies on the arguments made in those filings. RAP 10.1(g).

CONCLUSION

For the foregoing reasons, Mr. Olsen's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted February 1, 2011.

BACKLUND AND MISTRY



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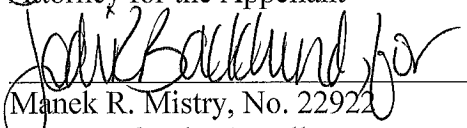

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Supplemental Brief, postage pre-paid, to:

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Further, I delivered an electronic version of the brief to Jeffrey Ellis, Attorney for Petitioner Sublett (with his permission),

and that I personally hand-delivered the original and one copy to the Supreme Court of the State of Washington.

All on February 1, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 1, 2011.

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